

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

MICHAEL RAY WHEELER,

Petitioner,

v.

JAMES COX, et al.,

Respondents.

Case No. 3:12-cv-00469-MMD-WGC

ORDER

This habeas matter comes before the Court on respondents' motion (dkt. no. 15) to dismiss the petition and petitioner's motion (dkt. no. 21) to stay. Respondents contend in the motion to dismiss that multiple claims are unexhausted or are based solely upon state law grounds. Petitioner seeks a stay pending the completion of a pending post-conviction appeal in the state supreme court.

I. BACKGROUND

Petitioner Michael Ray Wheeler challenges his 2007 Nevada state conviction, pursuant to a jury verdict, of domestic battery causing substantial bodily harm, and his adjudication as a habitual criminal. He has challenged the judgment of conviction on direct appeal and in two state post-conviction petitions, the second of which is still pending.

In the first state post-conviction proceeding, counsel was appointed for petitioner. Counsel filed a supplemental state petition and also pursued a number of issues on the first post-conviction appeal. The first state petition was timely, and the claims that were

1 pursued through to the appeal were rejected on the merits by the state supreme court.

2 Following the order of affirmance in the first state post-conviction appeal, the
3 remittitur issued on October 11, 2011. On or about January 30, 2012, Wheeler mailed a
4 second *pro se* state petition to the state district court clerk for filing. He sought therein
5 to pursue claims that counsel had not pursued on the first petition through to the first
6 post-conviction appeal.

7 On June 5, 2012, the State filed a motion to dismiss the second petition,
8 apparently on the basis that the second petition was untimely and successive.¹ The
9 state district court granted the motion to dismiss only in part on August 6, 2012, and it
10 apparently did not dismiss a number of the claims. Shortly thereafter, on August 10,
11 2012, the State moved for reconsideration, seeking the dismissal of all of the claims in
12 the second petition as untimely and successive.

13 On or about August 27, 2012, with the State's motion for reconsideration pending
14 in the state proceedings, Wheeler mailed the federal petition to the Clerk of this Court
15 for filing. At the time that Wheeler mailed the federal petition for filing, the federal one-
16 year limitation period potentially was subject to expiring only a short time later on
17 October 11, 2012, if the state courts ultimately conclusively hold that the second state
18 petition is untimely.²

19 ¹Respondents did not provide copies of state court record exhibits for all of the
20 proceedings discussed in this paragraph. The Court has culled the information reflected
21 in the text from the state district court's online docket sheet and from the references
22 back to the earlier proceedings in the order granting the State's motion for
23 reconsideration found in dkt. no. 16, Ex. 20. The online docket sheet does not enable
24 viewing of the underlying documents, however. The Court would prefer a more thorough
25 presentation of relevant state court record materials. The fact that the State initially did
26 not prevail in an effort to dismiss the entire second state petition on procedural grounds
27 is at least as potentially relevant as the fact that the State ultimately did prevail. With
28 regard to the discussion, *infra*, of petitioner's motion to stay, it appears that the timing of
petitioner's pursuit of federal habeas relief had at least something to do with the then-
current status of the state procedural defenses raised to the second state petition.

²The judgment of conviction was affirmed on April 7, 2008, and the first timely
state petition was filed by the state court clerk on June 19, 2008, before the ninety-day
time period expired for filing a *certiorari* petition. Accordingly, given statutory tolling
under 28 U.S.C. § 2244(d)(2), no time ran in the federal limitation prior to the October
11, 2011, issuance of the remittitur concluding the first state post-conviction
proceedings. Absent other tolling or delayed accrual, the limitation period therefore
(fn. cont...)

1 Subsequently, on October 25, 2012, the state district court granted the State's
 2 motion for reconsideration and dismissed the second petition in its entirety as untimely
 3 and successive. Petitioner timely appealed to the state supreme court. The second
 4 state post-conviction appeal was submitted for decision on February 8, 2013, and
 5 remains pending at this time.

6 Accordingly, if petitioner instead had waited for the outcome of the second state
 7 post-conviction proceedings to file a federal petition, such a federal petition would have
 8 been untimely, absent other tolling or delayed accrual, in the event that the state
 9 supreme court holds that the second state petition is untimely.

10 **II. EXHAUSTION**

11 Under 28 U.S.C. § 2254(b)(1)(A), a habeas petitioner first must exhaust his state
 12 court remedies on a claim before presenting that claim to the federal courts. To satisfy
 13 this exhaustion requirement, the claim must have been fairly presented to the state
 14 courts completely through to the highest court available, in this case the Supreme Court
 15 of Nevada. *E.g., Peterson v. Lampert*, 319 F.3d 1153, 1156 (9th Cir. 2003) (*en banc*);
 16 *Vang v. Nevada*, 329 F.3d 1069, 1075 (9th Cir. 2003). In the state courts, the petitioner
 17 must refer to the specific federal constitutional guarantee and must also state the facts
 18 that entitle the petitioner to relief on the federal constitutional claim. *E.g., Shumway v.*
 19 *Payne*, 223 F.3d 983, 987 (9th Cir. 2000). That is, fair presentation requires that the
 20 petitioner present the state courts with both the operative facts and the federal legal
 21 theory upon which his claim is based. *E.g., Castillo v. McFadden*, 399 F.3d 993, 999
 22 (9th Cir. 2005). The exhaustion requirement ensures that the state courts, as a matter of
 23 federal-state comity, will have the first opportunity to pass upon and correct alleged
 24 violations of federal constitutional guarantees. *See, e.g., Coleman v. Thompson*, 501
 25 U.S. 722, 731 (1991). Under *Rose v. Lundy*, 455 U.S. 509 (1982), a petition presenting

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 27 (...*fn. cont.*)

28 would expire one year later on October 11, 2012. Under the governing law, an untimely
 state petition does not statutorily toll the limitation period.

1 both exhausted and unexhausted claims must be dismissed without prejudice unless
2 the petitioner dismisses the unexhausted claims or seeks other appropriate relief.

3 **A. Ground 1**

4 In Ground 1, petitioner alleges that he was denied rights to effective assistance
5 of trial and appellate counsel, a fair trial, and due process of law in violation of the Fifth,
6 Sixth and Fourteenth Amendments. Petitioner seeks to incorporate fourteen claims of
7 ineffective assistance of trial counsel from pages 6-11 of his first state post-conviction
8 petition, and he further alleges that “to the extent that appellate counsel could have
9 raised any of these issues on direct appeal as plain error, he was prejudicially
10 ineffective as well.”³

11 With one limited exception, none of these incorporated claims were presented to
12 the Supreme Court of Nevada on the first state post-conviction appeal. In the fast track
13 statement on that appeal, petitioner pursued claims that he was denied effective
14 assistance of trial counsel when defense counsel: (a) failed to call an independent
15 forensic pathologist to rebut the State’s experts physicians; (b) failed to call an
16 independent expert on battered person syndrome and failed to object to testimony by
17 two police officers suggesting that the victim was subject to battered person syndrome;
18 and (c) failed to inform petitioner early in the case that he faced a potential habitual
19 criminal adjudication so that he could consider a negotiated plea rather than face the
20 greater sentencing exposure.⁴ With the exception discussed below, none of these three
21 claims correspond to any of the fourteen claims set forth at pages 6-11 of the first state
22 post-conviction petition.⁵ The one exception referred to above is claim 11 in state
23 Ground I in the original *pro se* state petition. Wheeler alleged therein that trial counsel
24 was ineffective for failing to object to Detective Fiore’s testimony, *inter alia*, that the
25 victim looked battered and that the redness of her eyes came from blunt force trauma

26 ³Dkt. no. 6, at 4-5.

27 ⁴See dkt. no. 16, Ex. 15, at 6, 13 & 21.

28 ⁵See dkt. no. 16, Ex. 9, at 6-11.

1 and strangulation because it constituted improper opinion testimony.⁶ As part of a much
2 broader claim pursued on the first post-conviction appeal, petitioner alleged that trial
3 counsel was ineffective for failing to object to Detective Fiore's testimony that the victim
4 looked battered and had petechiae (*i.e.*, redness from hemorrhaging) of her eyes from
5 strangulation because it constituted improper opinion testimony.⁷ Moreover, the
6 Supreme Court of Nevada addressed a claim on the appeal based upon "counsel's
7 failure to object to police officer opinions about the nature and cause of the victim's
8 injuries."⁸ This limited claim of ineffective assistance of trial counsel – only – therefore
9 is exhausted. No related claims of denial of rights to effective assistance of appellate
10 counsel, a fair trial, or due process of law were exhausted on the first post-conviction
11 appeal.

12 In his response to the motion to dismiss, petitioner maintains that responding to
13 respondents' exhaustion arguments would be "redundant" in light of his motion to stay,
14 and he therefore "refrains" from responding and "defers" to his motion to stay.⁹
15 Petitioner's understanding of the effect of filing a motion to stay is flawed. As
16 discussed, *infra*, a stay is not automatically granted in this context. Further to the
17 current point, the filing of a motion to stay does not eliminate the exhaustion issues from
18 the case or render them "redundant." Under Local Rule LR 7-2(d), the failure to file
19 points and authorities in response to a motion in full or in part constitutes a consent to
20 the granting of the motion to the extent to which no response is made. *E.g.*, *Joseph v.*
21 *Las Vegas Metropolitan Police Dept.*, 2010 WL 3238992, slip op. at *5 (D. Nev., Aug.
22 13, 2010). Petitioner accordingly has consented to the grant of the motion to dismiss
23 with regard to the exhaustion issues raised therein.

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26 ⁶Dkt. no. 16, Ex. 9, at 10.

27 ⁷Dkt. no. 16, Ex. 15, at 14.

28 ⁸Dkt. no. 16, Ex. 17, at 3.

⁹Dkt. no. 20, at 1-2.

Petitioner further suggests that any unexhausted claims presented must be reviewed *de novo* by this Court. Petitioner again is mistaken. The Court cannot consider the merits of an unexhausted claim except to *dismiss* the claim on the merits pursuant to 28 U.S.C. § 2254(b)(2).¹⁰

Ground 1, accordingly, is unexhausted except for a claim of ineffective assistance of trial counsel based upon counsel's failure to object to Detective Fiore's testimony that the victim looked battered and had redness from hemorrhaging of her eyes from strangulation because it constituted improper opinion testimony.

B. Ground 2

In Ground 2, petitioner alleges that he was denied rights to a fair trial, due process of law, a voluntary plea, and effective assistance of counsel in violation of the Fourth, Fifth, Sixth and Fourteenth Amendments. Petitioner seeks to incorporate pages 11-14 of his first state post-conviction petition.¹¹

In the referenced pages, in state Ground II in the original *pro se* petition, petitioner alleged that defense counsel brought petitioner a plea offer prior to trial wherein the State would not seek a habitual criminal adjudication if petitioner then entered a plea of domestic battery causing substantial bodily harm as charged. According to the claim, it was incumbent upon counsel to explain to petitioner that if he declined the offer, the State could wait until after a guilty verdict to seek habitual criminal treatment, increasing his potential exposure from 12 to 60 months to 60 to 240 months. Petitioner maintained that, properly advised, he would have accepted the plea agreement rather than risk the greater exposure.¹²

Respondents acknowledge that petitioner pursued the claim of ineffective assistance of trial counsel on the first post-conviction appeal.¹³ The Court is persuaded

¹⁰Petitioner's reliance upon *Wiggins v. Smith*, 539 U.S. 510 (2003), is misplaced. Nothing in *Wiggins* is contrary to the statements in the text.

¹¹Dkt. no. 6, at 5.

¹²Dkt. no. 16, Ex. 9, at 13-14.

¹³Dkt. no. 15, at 6; dkt. no. 16, Ex. 15, at 21-25.

1 by respondents' contention that petitioner did not exhaust the additional scattershot
 2 claims in the federal petition of a denial of constitutional rights to a fair trial, due process
 3 of law, and a voluntary plea. A petitioner must present both the operative facts and the
 4 federal legal theory to the state courts to exhaust a claim. *E.g., Castillo, supra*.

5 Ground 2 therefore is exhausted except for the claims based upon denial of
 6 rights to a fair trial, due process of law, and a voluntary plea.

7 **C. Ground 3**

8 In Ground 3, petitioner alleges that he was denied rights to effective assistance
 9 of trial and appellate counsel, a fair trial, and due process of law in violation of the Fifth,
 10 Sixth and Fourteenth Amendments. Petitioner alleges that he was constructively
 11 deprived of the right to counsel under *United States v. Cronin*, 466 U.S. 648 (1984). He
 12 incorporates the specific allegations of ineffective assistance of counsel in Ground 1;
 13 and he further seeks to incorporate pages 14-17 of his first state petition.¹⁴

14 In the referenced pages, in state Ground III in the original *pro se* petition,
 15 petitioner alleged in most pertinent part that he was constructively denied counsel
 16 because the conflict counsel appointed in his case was part of a group in which the
 17 lawyers were paid a flat \$500 per case without regard to whether the case resulted in a
 18 dismissal, plea, or jury trial. He alleged that his trial counsel therefore tried the case "on
 19 the fly" without investigation or preparation, including engaging in the alleged specific
 20 acts or omissions alleged in state Ground I.

21 Nothing corresponding to such a claim of constructive denial of counsel under
 22 *Cronin* was presented to Supreme Court of Nevada in the fast track statement on the
 23 first post-conviction appeal.

24 Ground 3 therefore is unexhausted.¹⁵

25 ¹⁴Dkt. no. 6, at 5.

26 ¹⁵The limited claim that is exhausted in federal Ground 1 under *Strickland* does
 27 not carry over to render the *Cronin* claim in Ground 3 exhausted in part. The moving
 28 factual premise behind the *Cronin* claim – based upon a constructive denial of counsel –
 in Ground 3 is not exhausted. There is no exhausted *Cronin* claim of constructive
 complete denial of counsel based upon such an isolated instance of alleged ineffective
 (fn. cont...)

1 **D. Ground 4**

2 A page with federal Grounds 4 through 7 was not included in the federal petition
3 on file in this matter. Respondents noted the absence of the page in their motion to
4 dismiss. Thereafter, petitioner simply attached a copy of the missing page with his
5 response to the motion to dismiss. While this manner of presentation is technically
6 insufficient to effectively amend the petition, the Court will ignore the technical
7 deficiency by the *pro se* petitioner in order to expedite the ultimate resolution of the
8 case.

9 In Ground 4, petitioner alleges that he was denied effective assistance of trial
10 and appellate counsel because there was no investigation done to support a defense
11 theory that the domestic violence victim received injuries instead from an accident. He
12 seeks to incorporate pages 13-16 of the counseled supplemental petition in the first
13 state post-conviction proceeding.¹⁶

14 Ground 4 was exhausted on the first post-conviction appeal as a claim of
15 ineffective assistance of trial counsel in failing to investigate and present expert
16 testimony supporting a defense that the victim's injuries resulted from accident rather
17 than domestic violence. No corresponding claim of ineffective assistance of appellate
18 counsel was exhausted on the post-conviction appeal.¹⁷

19 **E. Ground 5**

20 In Ground 5, petitioner alleges that he was denied effective assistance of trial
21 counsel for failure to consult with him throughout the litigation, including during
22 sentencing preparation. He refers to pages 16-20 of the supplemental petition. Dkt. no.
23 20, Ex. 24.

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 (...*fn. cont.*)

26 assistance as opposed to the limited claim under *Strickland* that was exhausted as to
Ground 1.

27 ¹⁶Dkt. no. 20, Ex. 24.

28 ¹⁷See dkt. no. 16, Ex. 15, at 6-13; *id.*, Ex. 17, at 2 ("failure to investigate and
present expert testimony").

1 No such claim corresponding to the claim at pages 16-20 of the supplemental
 2 petition was pursued in the fast track statement on the first state post-conviction
 3 appeal.¹⁸

4 Ground 5 is unexhausted.

5 **F. Ground 6**

6 In Ground 6, petitioner alleges that he was denied effective assistance of trial
 7 counsel because counsel failed to file motions to preclude evidence that allegedly was
 8 very prejudicial at trial. He seeks to incorporate pages 20-22 of the counseled
 9 supplemental petition in the first state post-conviction proceeding.¹⁹

10 No such claim corresponding to the claim at pages 20-22 of the supplemental
 11 petition was pursued in the fast track statement on the first state post-conviction
 12 appeal.²⁰

13 Ground 6 is unexhausted.

14 **G. Ground 7**

15 In Ground 7, petitioner alleges that he was denied effective assistance of trial
 16 counsel because counsel failed to advise petitioner that if he proceeded to trial he
 17 risked being adjudicated as a habitual criminal. Petitioner seeks to incorporate pages
 18 22-23 of the counseled supplemental petition in the first state post-conviction
 19 proceeding.²¹

20 Ground 7 is in substantial part redundant of Ground 2 and therefore is in
 21 substantial part exhausted to the same extent.

22 Respondents contend, however, that Ground 7 is not exhausted to the extent
 23 that petitioner included in the incorporated supplemental petition factual allegations that
 24 were not included in the fast track statement. Respondents contend in particular that

25 ¹⁸Compare dkt. no. 16, Ex. 10, at 16-20, with *id.*, Ex. 15, at, e.g., 6, 13 & 21.

26 ¹⁹Dkt. no. 20, Ex. 24.

27 ²⁰Compare dkt. no. 16, Ex. 10, at 20-22, with *id.*, Ex. 15, at, e.g., 6, 13 & 21.

28 ²¹Dkt. no. 20, Ex. 24.

1 Ground 7 is unexhausted to the extent that petitioner alleged in the incorporated
 2 supplemental petition that: (a) his wife and mother-in-law would testify that counsel
 3 never informed him that he faced habitual criminal exposure; and (b) his mother
 4 attended a meeting with petitioner and his counsel during which the plea offer was
 5 discussed.

6 The Court is not persuaded. Reliance upon additional factual allegations in
 7 federal court that do not fundamentally alter the legal claim already considered by the
 8 state courts does not render a claim unexhausted. See *Vasquez v. Hillery*, 474 U.S.
 9 254, 257-60 (1986).²²

10
 11 ²²Whether entirely new evidence then may be considered in federal court
 12 presents a different issue, however, separate and apart from the doctrine of exhaustion.
 13 In *Cullen v. Pinholster*, 131 S.Ct. 1388 (2011), the Supreme Court held that deferential
 14 review on the merits pursuant to AEDPA under 28 U.S.C. § 2254(d)(1) of a claim
 adjudicated on the merits by the state courts is restricted to the record that was before
 the state courts. The Court is persuaded by Judge Reed's analysis harmonizing
Vasquez and *Pinholster*.

15 The Court concludes . . . that the two rules can be harmonized, as
 16 the two rules in truth operate independently of one another. The *Vasquez*
 17 rule applies to all federal habeas claims, without regard to whether or not
 18 the claims later may be subject to deferential review on the merits under §
 2254(d)(1). It would make little sense to restrict the rule announced in
 19 *Vasquez* to the ambit of evidence that may be considered on deferential
 review under *Pinholster* – based upon alleged inconsistency otherwise
 between the two rules – as to a habeas claim that instead was subject to
de novo review rather than deferential AEDPA review. That is, there is no
 inconsistency – practical or otherwise – between the two rules in that
 instance because the *Pinholster* rule is inapplicable in that context.

20 Thus, resolving the exhaustion issue according to the ambit of
 21 evidence that may be considered on deferential AEDPA review under
Pinholster in truth would put the cart before the horse, with *Pinholster*
 22 being the cart. Analytically, the exhaustion issue should be resolved in the
 23 same manner without regard to whatever the scope of factual and legal
 review ultimately later may be on the merits, whether on deferential or *de*
novus review. Without a doubt, as a practical matter, in many cases
 24 additional factual allegations in the federal petition that will not render a
 claim unexhausted under *Vasquez* nonetheless will be excluded from
 federal consideration on the merits under *Pinholster* as to claims subject
 25 to deferential AEDPA review. However, as to claims instead subject to *de*
novus review, the rule in *Vasquez* operates both independently from and
 26 not inconsistently with the rule in *Pinholster*. These, again, are
 independent rules addressed to what are often practically interrelated but
 27 nonetheless legally distinct issues.

28 The Court accordingly will follow the rule of exhaustion stated in
Vasquez as a still fully viable rule following *Pinholster*.

(fn. cont...)

1 Ground 7 is exhausted. The Court will decline to dismiss Ground 7 as redundant
 2 of the exhausted portion of Ground 2 given the slightly different range of factual
 3 allegations included within the claims. In any answer ultimately filed on the merits,
 4 respondents may combine their response to the two grounds.

5 **H. Ground 8**

6 In Ground 8, petitioner alleges that he was denied effective assistance of trial
 7 counsel because counsel failed to present any forensic expert witnesses regarding the
 8 victim's injuries. Petitioner refers to pages 23-29 of the supplemental petition.²³

9 The only pertinent claims pursued on the first post-conviction appeal — or,
 10 alternatively, considered on the merits by the state supreme court — were claims that
 11 counsel failed to object to police officer testimony regarding battered person syndrome,
 12 to present an expert on that syndrome, and to produce an expert regarding the victim's
 13 injuries.²⁴

14 All claims in Ground 8 therefore are unexhausted except claims of ineffective
 15 assistance of trial counsel alleging that counsel failed to object to police officer
 16 testimony regarding battered person syndrome, to present an expert on that syndrome,
 17 and to produce an expert regarding the victim's injuries.

18 **I. Ground 9**

19 In Ground 9, petitioner alleges that he was denied effective assistance of trial
 20 counsel because counsel failed to present zealous closing argument comporting with
 21

22

(...fn. cont.)

23 *Moor v. Palmer*, No. 3:10-cv-00401-RCJ-WGC, dkt. no. 27, at 9-10 (D.Nev., July 17,
 24 2012). *Accord Lewis v. Nevada*, 2:10-cv-01225-PMP-CWH, dkt. no. 53, at 2-3 (D.Nev.,
 Feb. 4, 2013) (following Judge Reed's analysis); *Aytch v. Legrand*, 3:10-cv-00767-RCJ-
 WGC, dkt. no. 33, at 2 n.2 (D. Nev. March 29, 2013)(same).

25 ²³Dkt. no. 6, at 7.

26 ²⁴Dkt. no. 16, Ex. 15, at 13-17; *id.*, Ex. 17, at 2 ("failure to investigate and present
 27 expert testimony concerning the victim's injuries and battered-woman syndrome").
 28 Respondents make no argument that Ground 8 as specifically alleged in the federal
 petition is narrower than the state ground, even allowing for the reference to the pages
 in question.

1 the defense theory of the case. Petitioner refers to pages 30-31 of the counseled
2 supplemental petition in the first state post-conviction proceeding.²⁵

3 No such claim was pursued on the subsequent appeal. Ground 9 is
4 unexhausted.

5 **J. Grounds 10 through 15**

6 Petitioner maintains that Grounds 10 through 15 were raised in his second state
7 post-conviction petition. The proceedings on that petition remain pending in the state
8 court. Grounds 10 through 15 are unexhausted.²⁶

9 **K. Grounds 16 through 19 (redesignated as such by the Court)**

10 Petitioner further appears to present four grounds that he maintains were
11 presented previously on his direct appeal from the judgment of conviction. He
12 designates these grounds as Grounds I through IV despite the fact that he designated
13 other claims in the federal petition by those numbers.²⁷ Petitioner should have
14 designated the claims in the federal petition in a sequential order without repetition of
15 numbers. The Court will redesignate the claims as Grounds 16 through 19. The Court
16 is not persuaded by respondents' contention that Ground 17 is unexhausted because
17 petitioner presented only a state law claim to the state courts, for substantially the
18 reasons discussed in the following section concerning Ground 17.

19 Grounds 16 through 19 (redesignated) are exhausted.

20 **III. STATE LAW CLAIMS**

21 Respondents contend that (redesignated) Grounds 17 through 19 present only
22 state law claims that are not cognizable on federal habeas review. Petitioner notes his
23 disagreement with respondents' position in his response, but he "defers" to his motion

24 ²⁵Dkt. no. 6, at 7.

25 ²⁶The Court makes no implied holding as to the degree of correlation between
26 federal Grounds 10 through 15 and the claims in second state petition. Petitioner
27 suggests no basis for exhaustion of the claims other than via presentation in the second
28 state petition, and the Court accordingly decides the exhaustion issue as to the claims
on that basis.

²⁷Dkt. no. 6, at 13-15.

1 to stay.²⁸ Petitioner's response is flawed on this issue as well. The motion to stay does
2 not in any sense excuse petitioner from responding to the motion to dismiss.
3 Petitioner's failure to respond on this issue within his opposition to the motion to
4 dismiss, which was followed by a *Klingele* notice (dkt. no. 17), can operate as a consent
5 to a grant of the motion in this regard under Local Rule LR 7-2(d). *E.g., Joseph, supra*.
6 He further could not properly argue the issue for the first time in his reply on the motion
7 to stay.

8 The Court nonetheless is not persuaded by respondents' conclusory argument
9 that the incorporated direct appeal claims in Grounds 17 through 19 do not present
10 federal constitutional claims.

11 In the claim corresponding to Ground 17, petitioner claimed, *inter alia*, that he
12 had been convicted of a felony offense that had not actually been established by the
13 legislature as opposed to a misdemeanor in the situation presented. He contended that
14 the prosecution violated a rule of lenity that he maintained was grounded in the federal
15 constitution.²⁹ The state supreme court's implicit rejection of the claim, perhaps, may
16 not have been contrary to or an unreasonable application of clearly established federal
17 law, which is an issue for another day.³⁰ However, the claim presented on direct appeal
18 was not premised exclusively upon state law with no reliance upon the federal
19 constitution.

20 In the claim corresponding to Ground 18, petitioner challenged the State's ability
21 to amend the information post-verdict to add a habitual criminal allegation after the
22 defendant had exercised his Sixth Amendment right to a jury trial. Petitioner contended,
23 *inter alia*, that: (a) the State's action "constituted impermissible prejudice to the
24 Appellant pursuant to the Fifth, Sixth and Fourteenth Amendments of the Federal

25 ²⁸Dkt. no. 20, at 2 & 3-4.

26 ²⁹Dkt. no. 16, Ex. 4, at 16-17.

27 ³⁰*Cf. Carey v. McDaniel*, 3:10-cv-00143-LRH-WGC, dkt. no. 23, at 5 (discussing
28 the tangential relationship between a federal rule of lenity and federal constitutional doctrine).

1 Constitution;" (b) "sentencing Appellant as [a habitual criminal] would be a prejudicial
2 deprivation of his right to effective representation of counsel" because counsel had
3 failed to advise him prior to trial of the possibility of being adjudicated a habitual
4 criminal; (c) "the trial court simply summarily denied all of counsel's constitutional
5 challenges to the process," (d) the State could not file the post-verdict amendment with
6 "Constitutional impunity" under due process; and (e) the filing of the amendment after
7 petitioner had exercised his Sixth Amendment right to a jury trial violated his Fifth and
8 Sixth Amendment rights.³¹ Whether these federal constitutional claims ultimately have
9 merit on deferential AEDPA review, again, is an issue for another day. Petitioner did
10 not present an exclusively state law claim, however.

11 In the claim corresponding to Ground 19, petitioner alleged that the trial court
12 abused its discretion and violated his due process rights when it imposed the habitual
13 criminal sentence. Petitioner asserted, *inter alia*, that "federal due process requires the
14 sentencing court to exercise its discretion and weigh the appropriate factors for and
15 against the defendant before adjudicating him as an habitual criminal," *citing, inter alia*,
16 *Walker v. Deeds*, 50 F.3d 670 (9th Cir. 1995). He further urged that the state supreme
17 court "should impose a different due process standard in evaluating a sentence under"
18 the provision under which petitioner was sentenced.³² While the question is closer with
19 regard to the more conclusory and tangential constitutional references in this claim, the
20 Court nonetheless is not persuaded that the claim is subject to dismissal as an
21 exclusively state law claim.

22 The motion to dismiss therefore will be denied in part to the extent that
23 respondents seek the dismissal of redesignated Grounds 17 through 19 as presenting
24 only noncognizable state law claims.

25 ///

26 _____
27 ³¹Dkt. no. 16. Ex. 4. at 18-20.

28 ³²See dkt. no. 6-2, at electronic docketing pages 61 & 63. Respondents failed to
include page 28 of the brief in the copy filed with their state court record exhibits.

1 **IV. MOTION TO STAY**

2 The stay procedure approved in *Rhines v. Weber*, 544 U.S. 269 (2005), is the
3 only stay procedure that has been discussed or invoked herein.³³

4 In order to obtain a stay under *Rhines*, a petitioner must demonstrate that there
5 was good cause for the failure to exhaust the claims, that the unexhausted claims
6 include at least one claim that is not plainly meritless, and that the petitioner has not
7 engaged in intentionally dilatory litigation tactics. See 544 U.S. at 278.

8 **A. Good Cause**

9 The precise contours of what constitutes “good cause” in this context remain to
10 be fully developed in the jurisprudence. On the one hand, the Ninth Circuit has held
11 that a requirement that the petitioner show “extraordinary circumstances” to obtain a
12 stay does not comport with the good cause standard in *Rhines*. See *Jackson v. Roe*,
13 425 F.3d 654, 661-62 (9th Cir. 2005). On the other hand, *Rhines* instructs that a stay
14 should be available only in “limited circumstances,” such that the requirement of good
15 cause therefore should not be interpreted in a manner that would render stay orders
16 routine. *Wooten v. Kirkland*, 540 F.3d 1019, 1024 (9th Cir. 2008). Accordingly, a mere
17 impression by a petitioner that a claim was exhausted is not sufficient to establish good
18 cause for a failure to exhaust, given that, if it were, “virtually every habeas petitioner, at
19 least those represented by counsel, could argue that he *thought* his counsel had raised
20 an unexhausted claim and secure a stay.” *Id.* (emphasis in original).³⁴

21 ³³The Court is not persuaded by respondents’ contention that a stay is
22 unavailable because the petition is wholly unexhausted. The discussion in the preceding
23 section reflects that the petition is a mixed petition with both exhausted and
unexhausted claims.

24 ³⁴Respondents acknowledge the current precedent holding that extraordinary
25 circumstances are not required. Respondents, through an appropriate reservation, seek
26 to preserve for later review the argument that the standard for “good cause” under
Rhines should be similar to the standard for equitable tolling. That is, they contend that
the petitioner should be required to establish that extraordinary circumstances beyond
his control made it impossible for him to exhaust the claims.

27 Regarding respondents’ reserved issue, the Court is reluctant to import
standards either from equitable tolling or procedural default case law that are designed
28 to assess whether a petition or claim should be dismissed with prejudice, *i.e.*, with
conclusive finality, and which on occasion may require an evidentiary hearing.
(*fn. cont...*)

1 In the present case, the *pro se* petitioner in truth has not articulated a viable
 2 basis for establishing good cause. In the original motion, petitioner presented no
 3 apposite argument supporting the request for a stay. The lay petitioner essentially
 4 proceeded on the premise that a stay to exhaust the claims in the second state petition
 5 was available to him as a matter of course simply if he requested one. Respondents
 6 contended in their response, *inter alia*, that petitioner had not satisfied the requirements
 7 for a stay pursuant to *Rhines*. Petitioner thereafter referred to the *Rhines* requirements
 8 in his reply. However, he expressly, in his terms, “embraced” the rejected argument in
 9 *Wooten* that he “thought” that his counsel had raised the unexhausted claims.

10 Respondents’ counsel thus perhaps has had the better of the argument on the
 11 motion to stay. The Court nonetheless must do substantial justice in the situation
 12 presented. The Court will not ignore a viable basis for a finding of good cause
 13 recognized by a prior decision in this District merely because the *pro se* petitioner is not
 14 as adept at legal argument as an attorney might be.

15 As Judge Dawson has recognized in a prior case,³⁵ the Supreme Court identified
 16 one example of good cause subsequent to *Rhines* that would appear to be applicable to

17 _____
 (...fn. cont.)

18 Arguably, such heightened standards – directed to the question of whether, in the final
 19 analysis, a claim is conclusively procedurally barred – are inappropriate for the
 20 preliminary procedural question of whether a stay should be entered while petitioner
 21 fully exhausts claims in a mixed petition. It generally is more appropriate for the state
 22 courts to have the opportunity in the first instance to consider the application of
 23 conclusive procedural bars. *Cf. Gonzalez v. Wong*, 667 F.3d 965, 980 (9th Cir. 2011),
cert. denied, 133 S.Ct. 155 (2012) (noting that, in the circumstances presented, a stay
 was appropriate because it provided the state court with the first opportunity to resolve
 the claim). The Court is not sanguine that it should adopt standards that potentially
 could require an evidentiary hearing to resolve the preliminary procedural issue
 presented by a request for a stay.

24 If the bar that must be cleared under *Rhines* were as high as that required to
 25 establish either equitable tolling or cause-and-prejudice, the Supreme Court and the
 26 Ninth Circuit know quite well how to invoke such established standards. To date, neither
 27 has done so. The Ninth Circuit instead has stated to the contrary in *Jackson* that an
 “extraordinary circumstances” standard does not comport with the *Rhines* good-cause
 standard. The Court acknowledges, however, respondents’ reservation of the issue for
 later review.

28 ³⁵*Brown v. Neven*, No. 2:11-cv-00790-KJD-NJK, dkt. no. 35, at 5-8 (D. Nev. Jan.
 25, 2013).

1 the situation presented in a case such as this one. In *Pace v. DiGuglielmo*, 544 U.S.
 2 408 (2005), the Supreme Court held that a state post-conviction petition that was held to
 3 be untimely under state law was not “properly filed” as required for statutory tolling
 4 under 28 U.S.C. § 2244(d)(2). In arguing for a different rule, the petitioner in that case
 5 challenged the fairness of a rule under which the tolling effect of a state petition would
 6 be conclusively established only after the fact. Significantly for the present case, the
 7 Supreme Court responded as follows:

8 Finally, petitioner challenges the fairness of our interpretation. He
 9 claims that a “petitioner trying in good faith to exhaust state remedies may
 10 litigate in state court for years only to find out at the end that he was never
 11 ‘properly filed,’ ” and thus that his federal habeas petition is time barred . .
 12 . . . *A prisoner seeking state postconviction relief might avoid this*
 13 *predicament, however, by filing a “protective” petition in federal court and*
 14 *asking the federal court to stay and abey the federal habeas proceedings*
 15 *until state remedies are exhausted. See Rhines v. Weber, ante, 544 U.S.,*
 16 *at 278, 125 S.Ct. 1528, 1531, 161 L.Ed.2d 440 (2005). A petitioner’s*
 17 *reasonable confusion about whether a state filing would be timely will*
 18 *ordinarily constitute “good cause” for him to file in federal court. Ibid. (“[I]f*
 19 *the petitioner had good cause for his failure to exhaust, his unexhausted*
 20 *claims are potentially meritorious, and there is no indication that the*
 21 *petitioner engaged in intentionally dilatory tactics,” then the district court*
 22 *likely “should stay, rather than dismiss, the mixed petition”).*

23 544 U.S. at 416-17 (italic textual emphasis added).

24 The lay petitioner in this case – however inartfully – substantially has followed the
 25 procedure outlined by the Supreme Court in *Pace*. After state post-conviction counsel
 26 did not raise additional claims that petitioner wished to pursue, he promptly filed a
 27 second petition in state court seeking to present the claims. However, petitioner had no
 28 assurance – and still has none – when he filed the second state petition that the state
 courts would accept his arguments seeking to establish cause and prejudice to
 overcome state procedural bars to the otherwise untimely and successive second state
 petition. The federal limitation period would expire in the meantime, however, if he
 waited until the outcome of the proceedings on the second state petition before filing a
 federal petition. Petitioner thereupon has invoked, again however inartfully, the
 procedure identified in *Pace* as the solution to this procedural dilemma. He has filed a
 protective federal petition and now seeks to stay the petition while he seeks to exhaust

1 the claims in the second state petition and present his arguments to the state courts
2 seeking to overcome the state procedural bars to the second petition. Under the clear
3 teaching of *Pace*, petitioner's reasonable confusion, *i.e.*, uncertainty, as to whether the
4 second petition ultimately will be held to be timely by the state courts "will ordinarily
5 constitute 'good cause' for him to file in federal court" before exhaustion is completed on
6 the second petition.

7 Indeed, the procedural track substantially followed in this case is essentially the
8 track that state and federal court rulings effectively have been directing Nevada
9 petitioners down in cases where the petitioner wishes to pursue claims that his direct
10 appeal and/or state post-conviction counsel did not pursue. The state courts (as well as
11 the federal courts) generally do not allow litigants to present their own *pro se* claims or
12 argument when they are represented by counsel. This Court further has encountered
13 cases where the state courts also do not grant *pro se* motions for the withdrawal of
14 counsel in such proceedings, and the law is clear that there is no right to self-
15 representation either on direct appeal or in state post-conviction proceedings. The Court
16 thus repeatedly has rejected the proposition that a petitioner exhausts claims when he
17 attempts to present claims *pro se* on direct appeal and/or on state post-conviction
18 review while represented by counsel but is not permitted to do so by the state courts.³⁶
19 The Court further has repeatedly rejected the proposition that claims that a petitioner
20 thereafter might pursue in a second petition are technically exhausted by virtue of being
21 procedurally defaulted, given that the Nevada state courts apply substantially the same
22 standards as do the federal courts for overcoming a procedural bar.³⁷

23
24 ³⁶ See, e.g., *Elliott v. Benedetti*, No. 3:09-cv-00265-LRH-RAM, dkt. no. 30, at 5 &
11 (D. Nev. March 31, 2011).

25 ³⁷ See, e.g., *Johnson v. Neven*, No. 2:08-cv-01363-JCM-RJJ, dkt. no. 70, at 13-15
26 (D.Nev. July 26, 2012) (declining to find exhaustion on the basis of procedural default
27 absent an unequivocal stipulation, *inter alia*, that petitioner could not overcome the
28 procedural bars under the substantially similar standards for overcoming the bars in
state court). Given the similar standards, substantially any argument that a petitioner
might present in federal court to overcome a procedural default can be presented to the
state courts in the first instance. As the Court discussed in note 34, *supra*, this
(*fn. cont...*)

1 Such state and federal court rulings effectively drive a similarly-situated petitioner
 2 to follow the same procedural course that petitioner followed here, *i.e.*, to file a timely
 3 protective federal petition and request a stay in order to seek to exhaust his *pro se*
 4 claims in a second state petition. There simply is no other potentially viable procedural
 5 track to exhaust the *pro se* claims in this instance. The state courts will not allow a
 6 petitioner to pursue claims *pro se* while represented, and this Court has repeatedly
 7 rejected the argument that the *pro se* claims are exhausted because there is no
 8 available state procedure to present the claims.

9 The Supreme Court's decision in *Martinez v. Ryan*, 132 S.Ct. 1309 (2012),
 10 further reinforces a conclusion that good cause should be found in this procedural
 11 posture. In *Martinez*, the Court held that inadequate assistance of counsel in initial-
 12 review collateral proceedings may establish cause for a petitioner's failure to pursue a
 13 claim of ineffective assistance of trial counsel in such proceedings. If the Nevada state
 14 supreme court ultimately declines across the board to recognize the rule in *Martinez* as
 15 a potential basis for overcoming a state procedural bar, then this Court will factor such a
 16 holding into its application of exhaustion and procedural default rules. In the meantime,
 17 it is difficult to conceive how a petitioner effectively would present a *Martinez*-based
 18 argument in the state courts to overcome a failure by state post-conviction counsel to
 19 present a claim in the state district court other than through the filing of a *pro se* second
 20 state petition.³⁸

21 (*...fn. cont.*)

22 procedure gives the state courts the first opportunity to consider the application of state
 procedural bars and, if the bars are overcome, the merits of the claims.

23 ³⁸Particularly given *Martinez*, the Court is not persuaded that a petitioner must
 24 present express requests to his state post-conviction counsel to pursue all of the
 25 specific claims raised in the *pro se* second state petition in order to demonstrate good
 26 cause. A petitioner seeking to establish ineffective assistance of trial or appellate
 27 counsel is not required to establish that he requested trial or direct appeal counsel to
 28 pursue a claim or issue, just that counsel was ineffective for failing to do so. A different
 situation perhaps might be presented in a case where a petitioner instead waits until
 after a motion to dismiss for lack of exhaustion is filed in order to seek to pursue a
 second state petition. Here, however, petitioner promptly pursued the only state
 procedural vehicle potentially open to a petitioner seeking to pursue claims *pro se* that
 his state post-conviction counsel either declined – or failed – to pursue.

(*fn. cont...*)

1 Therefore, absent unusual circumstances not presented here, and given the
 2 discussion in *Pace*, the Court finds that a petitioner in this procedural posture has
 3 demonstrated good cause under *Rhines* when he diligently and promptly seeks to
 4 pursue a second state petition to exhaust *pro se* claims that his state post-conviction
 5 counsel did not pursue. Further, the petitioner in essence invokes the protective-
 6 petition procedure that the Supreme Court approved in *Pace* for situations where the
 7 timeliness of a state petition is at issue. The Court, accordingly, finds that petitioner has
 8 demonstrated good cause under *Rhines*.

9 **B. Not Plainly Meritless Claim**

10 When the *Rhines* Court discussed the issue of whether a petitioner has
 11 presented a claim that is not plainly meritless, the Court made a comparison cite to 28
 12 U.S.C. § 2254(b)(2) concerning this inquiry. 544 U.S. at 277. The Ninth Circuit has
 13 held that a district court may reject an unexhausted claim on the merits pursuant to §
 14 2254(b)(2) “only when it is perfectly clear that the applicant does not raise even a
 15 colorable federal claim.” *Cassett v. Stewart*, 406 F.3d 614, 623-24 (9th Cir. 2005).

16 Respondents posit in their response that the *pro se* petitioner failed in his original
 17 motion to address the merits of the unexhausted claims, other than to allege that his
 18 claims presented constitutional claims. Petitioner nonetheless presents claims in the
 19 federal petition that are being pursued in the second state petition that are not plainly
 20

21 (...fn. cont.)

22 Further, the fact that appellate and post-conviction counsel are not required to
 23 pursue every non-frivolous claim reinforces rather than undercuts a finding of good
 24 cause in this context. Again, if the state courts will not allow petitioners to present *pro*
 25 *se* papers in a represented case (as is the practice in both state and federal court) and if
 26 the federal court will not recognize such filings as exhausting claims, a petitioner must
 have some procedural vehicle to fairly present the *pro se* claims to the state courts.
 Those courts perhaps ultimately may find such claims to be barred. However, they will
 have been given the first opportunity to consider whether the *pro se* petitioner has
 meritorious claims that state post-conviction counsel failed to pursue through
 inadequate assistance to defeat state procedural bars.

27 The Court further is not persuaded that a lay petitioner must seek to proceed
 28 wholly without counsel on the first state petition in order to establish good cause in this
 context. Here, petitioner sought to present claims *pro se* promptly following the
 conclusion of the represented proceedings in the state district court.

1 meritless under the *Cassett* standard. For example, in Ground 11, petitioner alleges,
2 *inter alia*, that he was denied effective assistance of trial counsel when counsel failed to
3 challenge: (a) alleged prosecutorial misconduct when the prosecution allegedly coerced
4 and manipulated the victim to testify at the preliminary hearing knowing that she was
5 impaired by intoxication and illness and thereafter impeached her trial testimony with
6 the unreliable preliminary hearing testimony, without disclosing evidence that would
7 have provided a basis for impeaching her preliminary hearing testimony; (b) alleged
8 prosecutorial misconduct when the prosecution allegedly conspired with an investigating
9 detective to make it appear that the victim was lucid when she spoke with the detective
10 at the hospital, despite medical evidence allegedly to the contrary, thereby allowing the
11 State to impeach her trial testimony with her alleged original statement, all in an
12 allegedly improper effort to undercut evidence otherwise tending to establish that the
13 victim and a friend were acutely intoxicated at the relevant time; (c) alleged
14 prosecutorial misconduct when the prosecution (i) allegedly misstated to the jury that
15 Wheeler did not suffer injuries similar to the victim's from slipping and falling in his own
16 blood, when both the prosecutor and trial counsel had information to the contrary, and
17 (ii) injected the prosecutor's own allegedly personal and unfounded belief that the
18 victim's trial testimony was due both to her fear of retaliation by the defendant and to
19 having been "brainwashed" by him; (d) alleged inconsistencies in the investigating
20 police officers' reports and testimony regarding the sequence of events, including the
21 point at which Wheeler slit his wrists and bled on the floor in relation to an altercation
22 with his wife; and (e) allegedly improper evidence collection procedures and
23 inconsistencies in officers' testimony regarding same, including the procedures and
24 testimony regarding a knife introduced in evidence. On the record currently presented,
25 the Court is unable to say that it is perfectly clear that petitioner does not raise even a
26 colorable federal claim in, *inter alia*, these claims.

27 As reiterated below, the Court's limited holding above does not signify either that
28 petitioner is entitled to relief on the claims or that the claims potentially may not be

1 subject to state procedural bars. However, the unexhausted claims include claims that
 2 are not plainly meritless on the face of the pleadings and on the current partial record,
 3 when viewed under the *Cassett* standard.

4 **C. Not Intentionally Dilatory**

5 Respondents do not contend that petitioner has engaged in intentionally dilatory
 6 tactics herein, and the record does not reflect that he has. The relevance of this factor,
 7 as a practical matter, largely is restricted to capital cases.³⁹

8 **D. Grant of *Rhines* Stay**

9 Accordingly, following consideration of all the *Rhines* factors, the Court finds that
 10 the matter should be stayed pursuant to *Rhines*, under the conditions specified in the
 11 disposition paragraphs of this order.

12 The Court expresses no opinion by this order as to whether the circumstances
 13 presented satisfy the cause-and-prejudice standard with respect to any claim of
 14 procedural default. The holding herein should not be read as an express or implied
 15 holding on this issue or any other issue. The Court holds here only that the criteria for a
 16 stay under *Rhines* have been satisfied, and its holding in this order is expressly limited
 17 to that specific context.

18 **E. Request for *Slack* Instruction**

19 Respondents request that, if the Court grants a stay, it instruct petitioner that he
 20 must bring only exhausted claims upon his return to federal court.

21 Respondents rely upon *Slack v. McDaniel*, 529 U.S. 473 (2000). In *Slack*, the
 22 Supreme Court held that a federal petition filed after a prior petition had been dismissed
 23 without prejudice as a mixed petition was not a successive petition. The Nevada state

24 ³⁹*Cf. Lawrence v. Florida*, 549 U.S. 327, 344 & n. 9 (2007)(Ginsburg, J.,
 25 dissenting) (“Most prisoners want to be released from custody as soon as possible, not
 26 to prolong their incarceration. They are therefore interested in the expeditious resolution
 27 of their claims. . . . Though capital petitioners may be aided by delay, they are a small
 28 minority of all petitioners.”); *Valdovinos v. McGrath*, 598 F.3d 568, 574 (9th Cir. 2010),
vacated for reconsideration on other grounds, 131 S.Ct. 1042 (Jan. 24, 2011) (petitioner
 “had not engaged in dilatory tactics and he had no motivation for delay, as he is not a
 capital defendant”).

1 respondents raised the concern in *Slack* that “upon exhaustion, the prisoner would
 2 return to federal court but again file a mixed petition, causing the process to repeat itself
 3 . . . [such that] a vexatious litigant could inject undue delay into the collateral review
 4 process.” 529 U.S. at 488. The Supreme Court then identified a number of factors that
 5 would tend to minimize the likelihood of that occurring, including the application of state
 6 procedural bars and the then relatively recently adopted provisions of AEDPA.⁴⁰
 7 Counsel for the habeas petitioner further conceded that the “it would be appropriate for
 8 an order dismissing a mixed petition to instruct an applicant that upon his return to
 9 federal court he is to bring only exhausted claims,” with the Court citing to Federal Rule
 10 of Civil Procedure 41(a) and (b). 529 U.S. at 489.

11 This Court does not read *Slack* as inexorably requiring the requested instruction
 12 in a case that is stayed pursuant to *Rhines*. The *Slack* Court was referring to a condition
 13 placed upon a dismissal without prejudice under Rule 41. A stay is not a dismissal,
 14 although the Court, of course, may place conditions upon a stay. Further, as the
 15 Supreme Court then alluded to only four years after the passage of the Act, the
 16 provisions of AEDPA curtail the ability of a vexatious petitioner to pursue serial mixed
 17 petitions. The prospect of a petitioner being able to effectively present serial mixed
 18 petitions *ad infinitum* is far more unlikely under AEDPA, even within a single action with
 19 stays, due to the combined impact of the federal one-year limitation period and relation-
 20 back rules.

21 If *Slack* unequivocally commanded the requested instruction, this Court, of
 22 course, would give it. However, the Court is reluctant to render an in effect anticipatory
 23 ruling and instruction regarding a situation that is not presented as yet. For example,
 24 the Court is not sanguine that it necessarily would preclude a petitioner from pursuing
 25 an unexhausted claim after a stay if in the interim the petitioner had discovered the

26 ⁴⁰*Cf. Slack*, 529 U.S. at 478-79. In *Slack*, both the first federal petition in 1991
 27 and the second petition in 1995 were filed prior to the effective date of AEDPA.
 28 Accordingly, neither the second petition nor any claims raised therein were subject to,
 e.g., the one-year federal limitation period in § 2244(d)(1).

1 factual predicate for a claim that could not have been discovered previously through the
 2 exercise of due diligence. Cf. 28 U.S.C. § 2244(d)(1)(D)(discovery rule resulting in
 3 delayed accrual of federal limitation period as to a claim). The better practice arguably
 4 would be to address whether a petitioner can pursue additional unexhausted claims if
 5 and when such a request is presented, based upon the circumstances then presented.
 6 Respondents, understandably, are concerned with the prospect of vexatious serial
 7 habeas litigation. However, there also is a countervailing consideration that a habeas
 8 petitioner generally will not be able to seek federal habeas relief thereafter once a
 9 federal petition is concluded on the merits. The better practice again is to address any
 10 situation of additional unexhausted claims being raised based on the circumstances
 11 then presented.

12 That said, if any of the claims that the Court has found to be unexhausted in the
 13 present order are not exhausted by the currently pending state proceedings, petitioner
 14 will have to dismiss any such still-unexhausted claims after the stay is lifted. Under
 15 *Rose*, he must dismiss any such still-unexhausted claims to avoid dismissal of the entire
 16 petition.

17 **V. CONCLUSION**

18 IT IS THEREFORE ORDERED that respondents' motion to dismiss the petition
 19 (dkt. no. 15) is GRANTED IN PART and DENIED IN PART, such that the Court holds
 20 that the following claims (the "unexhausted claims") are not exhausted:

- 21 (a) Ground 1 except for a claim of ineffective assistance of trial counsel
 22 based upon counsel's failure to object to Detective Fiore's
 23 testimony that the victim looked battered and had redness from
 24 hemorrhaging of her eyes from strangulation because it constituted
 25 improper opinion testimony;
- 26 (b) the claims in Ground 2 based upon denial of rights to a fair trial,
 27 due process of law, and a voluntary plea;
- 28 (c) Ground 3 in its entirety;

- 1 (d) the claim of ineffective assistance of appellate counsel in Ground 4;
- 2 (e) Grounds 5 and 6 in their entirety;
- 3 (f) Ground 8 except for claims of ineffective assistance of trial counsel
- 4 alleging that counsel failed to object to police officer testimony
- 5 regarding battered person syndrome, to present an expert on that
- 6 syndrome, and to produce an expert regarding the victim's injuries;
- 7 and
- 8 (g) Grounds 9 through 15 in their entirety.

9 IT IS FURTHER ORDERED that petitioner's motion to stay (dkt. no. 21) is
 10 GRANTED and that this action is STAYED pending completion of the pending state
 11 proceedings. Petitioner thereafter may move to reopen the matter, and any party
 12 otherwise may move to reopen the matter at any time and seek any relief appropriate
 13 under the circumstances.

14 IT IS FURTHER ORDERED that, taking into account that state post-conviction
 15 proceedings already are pending, the grant of a stay is conditioned upon petitioner
 16 returning to federal court with a motion to reopen within forty-five (45) days of issuance
 17 of the remittitur by the Supreme Court of Nevada at the conclusion of all state court
 18 proceedings.⁴¹

19 IT IS FURTHER ORDERED that if petitioner intends to amend the petition after
 20 this action is reopened, he shall file together with the motion to reopen either a motion
 21 for leave to amend along with the proposed verified amended petition or a motion for
 22 extension of time to move for leave to amend.⁴² Respondents shall have thirty (30) days

24 ⁴¹If *certiorari* review will be sought or thereafter is being sought, either party may
 25 move to reinstate the stay for the duration of any such proceedings. *Cf. Lawrence v. Florida*, 549 U.S. 327, 335 (2007).


26 ⁴²No claims in the current pleadings are dismissed by this order. Any further *pro*
 27 se pleadings filed by petitioner herein must be filed on the Court's required noncapital §
 28 2254 form, must allege all of his claims with specificity within the petition form itself
 without incorporation of other documents by reference, must set forth all of petitioner's
 claims within a single stand-alone pleading, and otherwise must comply with all
 instructions for the form.

1 to file a response to the motion or motions filed. The reopened matter will proceed
2 under the current docket number.

3 IT IS FURTHER ORDERED, due to staffing changes, that any hard copies of any
4 further state court record exhibits filed herein shall be forwarded to the staff attorneys in
5 Las Vegas.

6 IT IS FURTHER ORDERED that the Clerk of Court shall administratively close
7 this action until such time as the Court grants a motion to reopen the matter.

8
9 DATED THIS 29th day of May 2013.

10
11 
12 MIRANDA M. DU
13 UNITED STATES DISTRICT JUDGE
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